

IN THE UTAH COURT OF APPEALS

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Thao T. Duong,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner,	)	
	)	Case No. 20100325-CA
v.	)	
	)	
Department of Workforce	)	F I L E D
Services,	)	(October 21, 2010)
	)	
Respondent.	)	<span style="border: 1px solid black; padding: 2px;">2010 UT App 295</span>

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Original Proceeding in this Court

Attorneys:  Thao T. Duong, West Valley City, Petitioner Pro Se  
            Geoffrey T. Landward, Salt Lake City, for Respondent

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Before Judges Orme, Thorne, and Voros.

PER CURIAM:

Petitioner Thao T. Duong seeks judicial review of two decisions of the Workforce Appeals Board (the Board). The first decision disqualified her from receiving unemployment compensation benefits based upon a failure to accept suitable work without good cause. The second decision imposed a fraud overpayment and a statutory penalty for failing to report that she had rejected an offer of suitable work. This case is before the court on a sua sponte motion for summary reversal on the basis that the Board's decision that Duong rejected suitable work is not reasonable and rational and could not support the decision imposing a disqualification, overpayment, and penalty.<sup>1</sup>

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<sup>1</sup>The Board incorporates by reference arguments made in the memorandum submitted in support of an earlier sua sponte motion for summary affirmance, which was withdrawn by the court. We have considered the arguments made from the previous memorandum, along with those in the Board's memorandum opposing summary reversal. We have also obtained and reviewed the entire agency record, as alternatively requested by the Board in its memorandum opposing summary reversal.

A claimant is disqualified from receiving unemployment benefits based upon a failure to accept suitable work without good cause. See Utah Code Ann. § 35A-4-405(3) (Supp. 2009). "[I]f suitable work is available, the claimant has an obligation to properly apply for and accept offered work." Utah Admin Code R994-405-301. "Good cause for failing to accept available work is established if the work is not suitable or accepting the job would cause hardship which the claimant was unable to overcome." Id. R994-405-310(1). Good cause is limited to circumstances "which were beyond the claimant's control or were compelling and reasonable." Id. R994-405-310(2). Even if good cause is not established, "[a] claimant will not be denied benefits for failing to . . . accept work if it would be contrary to equity and good conscience." Id. R994-405-311. However, the claimant must have "acted reasonably and the decision to refuse the offer of work [must be] logical, sensible, or practical." Id. We will reverse an administrative agency's findings of fact "only if the findings are not supported by substantial evidence." Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997). We will not disturb the Board's conclusion regarding the application of law to facts unless it "exceeds the bounds of reasonableness and rationality." Nelson v. Department of Emp't Sec., 801 P.2d 158, 161 (Utah Ct. App. 1990).

The Board argues that because the Board adopted the Administrative Law Judge's (ALJ) findings of fact, the Board should not have adopted and analyzed Duong's testimony that she was offered only two days of work. In essence, the Board requests us to disregard portions of its own analysis. However, it is not clear that the ALJ found the supervisor's testimony that Duong was offered "full-time" work more credible than Duong's unwavering testimony that she was offered only two days of work with the possibility of more work later. The ALJ's decision does not specifically address credibility, and his findings of fact consisted only of the following:

The claimant worked for this employer from September 1, 2005, through June 2009, when she was laid off. On July 31, 2009, the claimant was called by her supervisor and asked to return to work. The claimant wanted assurances that the job would be permanent. The supervisor could not guarantee the job would be permanent. The claimant refused the offer to return to work as she wanted to seek work with another employer.

The ALJ's analysis made no reference to the amount of work offered. Instead, the ALJ reasoned that "[t]he conditions of employment the claimant would have experienced had she accepted the July 31, 2009 call to return to work were the same as the

conditions of employment that existed prior to the June 2009, layoff." The ALJ neither accepted nor rejected Duong's claim that she was offered only two days of work.

In contrast, the Board decision quoted and analyzed Duong's testimony that she was offered only two days of work with the possibility of additional work in the future. At the beginning of its decision, the Board adopted the ALJ's findings of fact. However, the Board later quoted the following portion of Duong's testimony:

He say that because temporary did not have enough material merchandise, so just for two days. Just work for two days. And when later on if there are more work then come-- you know, then I have more work to do. And I told him that yeah, I really want to go back to work, but I'm looking for something else better to do because I have trouble at work.[<sup>2</sup>]

The Board concluded that "[f]rom the Claimant's testimony during the hearing it is clear that if the work had been full-time the Claimant would have returned to work and continued to tolerate the working conditions." Elsewhere, the Board stated,

While it is understandable that the Claimant would have preferred work that lasted longer than two days, the Claimant could have accepted the work for two days and still continued to look for full-time work. . . . The Claimant was not employed, drawing unemployment benefits, and had the opportunity to work for two days. . . . Even the Employer's witness at the hearing agreed that the Employer did not have sufficient

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<sup>2</sup>Duong also testified that the offer of work was "just for two days because there was not no work, not enough job." When asked why she did "not accept the two-day job" until she found another job, Duong responded that her supervisor was always threatening to fire her. When asked if she had anything to add, Duong again stated that she was offered two days of work and could be offered more "when there's more work." When asked if the work was limited to two days, Duong's supervisor testified the he offered her a full-time job, but he could not say for how long. However, his testimony included several inaudible statements that cannot be reviewed, so his testimony regarding the specifics of the offered work is properly characterized as incomplete.

work to keep the Claimant and others employed.

The Board argues before this court that the offer of two days of work was an offer of "suitable work" because Duong had been unable to find new employment and had no immediate prospect of full-time work, as indicated by her acceptance of benefits for a significant period after rejecting the offer of work from her former employer. The Board relies upon rule 994-405-301(3) of the Utah Administrative Code, which was not analyzed in the decisions of either the ALJ or the Board. Rule 994-405-301(3) states, in relevant part, that "[w]hether a job is suitable depends on the length of time that the claimant has been unemployed." Utah Admin. Code R994-405-301(3). Before this court, the Board also relies upon rule 994-405-306(9) of the Utah Administrative Code, which also was not analyzed in the decision by the ALJ or the Board. That rule states, in part: "If the claimant has no recent history of temporary or part-time work, the work may still be considered suitable, particularly if the claimant has been unemployed for an extended period and does not have an immediate prospect of full-time work." Utah Admin. Code R994-405-306(9). In reliance upon these rules, the Board now contends that Duong's refusal of an offer of two days of work was a refusal of suitable work based upon her continued unemployment for a significant period after she declined the offer of two days of work. We decline to view as dispositive these rules that neither the ALJ nor the Board saw fit to consider during the course of their respective deliberations.

Accordingly, we reverse the decision of the Board disqualifying Duong from benefits based upon a refusal of an offer of suitable work because the decision "exceeds the bounds of reasonableness and rationality." See Nelson v. Department of Emp't Sec., 801 P.2d 158, 161 (Utah Ct. App. 1990). Because we reverse the Board's decision that concluded Duong refused an offer of suitable work, we also reverse the Board's separate decision imposing a fraud overpayment and statutory penalty in the total amount of \$13,572 for failure to report the refusal of an offer of suitable work.

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge

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J. Frederic Voros Jr., Judge